Federal Court  Cour fédérale

Date: 20180801

Docket: IMM-3630-18

Citation: 2018 FC 812

Ottawa, Ontario, August 1, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JUDE PETERSON JOSEPH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Applicant is a citizen of Haiti. He was found inadmissible to Canada for reasons of serious criminality and has been the subject of a deportation order since August 22, 2013. Having completed the most recent criminal proceedings against him, he is now ready for removal by the Canada Border Security Agency (CBSA). His request for deferral of his removal made on July 27, 2018 was denied on July 30, 2018. He now moves for a stay of the execution of

the removal order, currently scheduled for 9 AM August 2, 2018, until such time as his application for leave and for judicial review of the deferral refusal is decided by this Court.

[2] For the reasons that follow, the motion is dismissed.

II. Background

[3] The Applicant is 25 years old. At the age of two, he moved to the United States with his mother and siblings. His father remained in Haiti. In September 2007, the mother and children moved to Canada and claimed refugee protection. In February 2009, when the Applicant was 12, his mother withdrew his refugee claim apparently because of his misbehavior and sent him back to Haiti to live with a family friend. He was in Port-au-Prince when the earthquake happened and observed many disturbing events. A few weeks later, he was robbed near his home. His mother then arranged for him to live with another friend in the Dominican Republic. The Applicant returned to Haiti in January 2011, after his mother filed for permanent residence in Canada and included him in the application.

[4] The Applicant returned to Canada and became a permanent resident on September 12, 2011. Within one month, he committed a robbery in which he threatened to kill the victim. He was convicted of the robbery, obstruction of justice and failure to comply in June 2012 for which he served a six month jail sentence. In March 2013 he was convicted of break and enter with intent, mischief and failure to comply and served a 10 month sentence. He was again convicted of mischief and failure to comply in June 2013. A charge of assault in 2014 resulted in an

acquittal. From November 2012 to March 2015, the Applicant was given a number of immigration conditions and arrested three times for failure to comply with those conditions.

[5] On August 22, 2013, the Applicant having been the subject of a report under s 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA], a deportation order was issued. The Applicant's appeal of that decision was later dismissed by the Immigration Appeal Division (IAD). The Applicant was offered a Pre-removal Risk Assessment (PRRA) at a removal interview on January 13, 2016. The PRRA was denied and the Applicant's subsequent application for leave for judicial review was dismissed when he failed to file an Application Record.

[6] In August 2016, the Applicant was arrested and charged with attempted murder, conspiracy to commit an indictable offence, breach of recognizance and aggravated assault. He spent approximately five months in custody. He was then required to reside with his mother until June 2018 under strict criminal and immigration conditions. His detention order was then relaxed to allow him to move in with his girlfriend with whom he has had a relationship since the summer of 2014. His girlfriend has two children from a prior relationship and a third child with the Applicant. She works nights as a nurse while the Applicant cares for the children. The two older children have a close bond with the Applicant.

[7] In February 2017, the Applicant sought assistance from the Canadian Mental Health Association and has continued to participate in group counseling. In August 2017, the Applicant received a psychiatric assessment and was diagnosed with Post-Traumatic Stress Disorder

("PTSD") and depression. Apart from these conditions, he was otherwise assessed as healthy without psychosis or suicidal ideation. While medication was recommended by the psychiatrist, there is no evidence that it was prescribed or that he continued to be seen by the psychiatrist. He began to see a psychotherapist in February, 2018. The Applicant also returned to adult high school and has acquired credits towards completion of the requirements for graduation.

[8] In April 2018, the Applicant advised the CBSA that he was considering filing an application for humanitarian and compassionate consideration (H & C) and making a request for a new PRRA application. As of the present date, one day short of his scheduled removal, neither application has been submitted.

[9] The Applicant seeks a stay of removal to submit a new PRRA application to present evidence of his PTSD and risks he will face in Haiti.

III. Issues

[10] In order for an Applicant to be successful on a stay motion, he must establish the conjunctive tripartite test, set out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*,[1987] 1 S.C.R. 110 and applied by the Federal Court of Appeal to stays of deportation in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), namely that there is a serious issue to be tried, that he would suffer irreparable harm if a stay is not granted and that the balance of convenience lies in his favour.

[11] The Applicant argues that serious issues arise from the enforcement officer's refusal to defer decision in that the officer:

a) failed to take into consideration the Applicant's changed circumstances, which give rise to an unassessed risk;

b) failed to reasonably consider the short-term interests of the children; and

c) failed to reasonably consider the evidence of Haiti's present country conditions.

[12] The Applicant argues that he will suffer irreparable harm if a stay is not granted as a person suffering from PTSD, and because of the volatile conditions in Haiti, and that his partner and the children will also suffer irreparable harm by his removal. The balance of convenience, he argues, is in his favour as the party who would suffer more if interim relief is not granted.

IV. Analysis

[13] As enunciated by Pelletier J., as he then was, in *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, 2001 FCT 148, an elevated standard applies to a stay motion arising from a refusal to defer an Applicant's removal because the stay, if granted, effectively grants the relief sought in the underlying judicial review application. Accordingly, it is necessary to go further than simply applying the serious issue test and to closely examine the merits of the underlying application.

[14] To defer removal in these circumstances, there must be two things: (a) the Applicant must be engaged in a process that could potentially lead to him or her being granted landing in Canada and (b), there must be a legal justification, within the officer's discretion, which allows

him to defer the Minister's responsibility to execute the order. As stated by Justice Pelletier in *Wang* at paragraphs 45 and 48:

> 45. The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act....
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> 48. [...] At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes when the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances where deferral might result in the order becoming inoperative.

[15] Justice Pelletier's observations were endorsed by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]. In particular, the Court of Appeal endorsed Justice Pelletier's conclusions that an elevated standard applied and that "deferral should be reserved for those applications or processes where the failure to defer will expose the Applicant to the risk of death, extreme sanction or inhumane treatment" and where the consequences of removal in those circumstances cannot be made good by readmitting the person to the country. Deferral is "a temporary measure necessary to obviate a serious, practical impediment to immediate removal." (*Baron* para 49)

[16] In order to establish a serious issue when the elevated standard applies, the Applicant must show that his underlying application raises “quite a strong cas” (*Baron* para 67).

[17] In the present matter, there is no process underway that could potentially lead to the Applicant being granted landing in Canada. The Applicant seeks time in order to present a fresh application for a PRRA. I note that he has failed to take advantage of the opportunity to do so since he became eligible in 2017, a year after his first application was denied. This is not, therefore, a case such as *Etienne v. Canada (Public Safety and Emergency Preparedness)* 2015 FC 415 where eligibility to file a PRRA application was imminent when the deferral was refused. In the present matter, I agree with the Respondent that the Applicant is seeking in effect an indefinite stay of his removal.

[18] The Federal Court of Appeal considered the officer’s discretion to defer when the Applicant has presented a new, post-PRRA risk, in *Canada (Minister of Public Safety and Emergency Preparedness) v Shapati*, 2011 FCA 286 [*Shapati*]. The Court considered that where there is such evidence the officer would consider whether it warranted deferral and exercise his discretion accordingly.

[19] Here, the Applicant asserted a risk of persecution or harm as a result of having incurred PTSD following the 2010 earthquake in his 2016 PRRA application. The officer held that the Applicant had not provided objective evidence to support that he had been affected emotionally mentally or that he had been diagnosed with PTSD as a result of the earthquake. There was no evidence at that time that he had accessed professional treatment for his PTSD during the five

years that he had been in Canada and the Applicant had not provided an explanation as to why he had not sought treatment for his mental health issues since his arrival to Canada in 2011. The PRRA officer also considered that the Applicant's medical condition would not in itself constitute a forward looking risk that would bring him within the definition of a person in need of protection. The officer also considered country condition documentation regarding the risk to returnees in Haiti from gangs and concluded that it did not establish a personalized risk for the Applicant.

[20] Where there are new allegations of risk made at the deferral stage, the removals officer may generally only consider such allegations where the alleged risk is obvious, very serious and could not have been raised earlier: *Vargas v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 938 at para 17. Here, the assertion of risk based on the Applicant's PTSD had been raised before the PRRA officer although not supported by evidence.

[21] The evidence before the removals officer on the request for deferral included letters from the CMHA, the psychiatric assessment, and a report from the psychotherapist. The officer noted that following the negative PRRA decision, the Applicant was diagnosed with PTSD and became eligible to submit another PPRA on August 15, 2017. There was no evidence that the Applicant was receiving medication or having follow-up treatment with a psychiatrist for his PTSD. The evidence was that he was participating in a group counselling session and seeing a psychotherapist from time to time. The officer considered this evidence and concluded that it demonstrated that the Applicant was making efforts to deal with his problems but was not

persuaded that it warranted deferral. In my view, the Applicant has not made out a strong case that the officer's conclusion is unreasonable.

[22] The officer considered the short term best interests of the children. He acknowledged that the removals process can be difficult, particularly for children. He noted, however, that the children would remain under the care of their mother who is a Canadian citizen and concluded that they were likely to adjust to the new circumstances relatively easily and naturally. This is not a case such as *Danyi v Canada (Minister of Public Safety and Emergency Preparedness*), 2017 FC 112 or *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)* 2017 FCA 130 where issues relating to the short term care of the children were raised. The two older children had lived with their mother as a single parent prior to the Applicant's entry into the family. The youngest, is still an infant. The three children will continue to enjoy the care of their mother although she, as the officer recognized, would not have the support that the Applicant presently provides. This is, however, one of the unfortunate consequences of deportation. The Applicant has not demonstrated that he has a strong case that the officer's conclusion in this regard was unreasonable.

[23] With respect to country conditions in Haiti there is no doubt that they are currently volatile because of political unrest. However, as the officer noted, removals to Haiti which had previously been suspended were resumed on March 28, 2017. At present, there is no barrier to the Applicant's removal to his country of origin on that basis.

[24] The argument that the Applicant would suffer irreparable harm because of his PTSD, lack of familiarity with the country and inability to speak the language does not amount to the level of "the risk of death, extreme sanction or inhumane treatment" discussed in *Wang* and *Baron*, above. The country condition evidence submitted by the Applicant relating to the treatment of persons with mental health problems in Haiti indicates that there may be stigmatization and the belief that they can be treated by spiritual measures (voodoo). While it points to adjustment difficulties, as the officer recognized, the evidence does not establish that the Applicant would suffer persecution to the level of irreparable harm.

[25] Having considered the material filed and the submissions of counsel for the parties, I am not satisfied that this is a case in which the Court should exercise its equitable jurisdiction to intervene with the Minister's duty to enforce the statute. Accordingly, the motion is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of the execution of the removal order in this matter is dismissed.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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